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In the Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, PETITIONER

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission is required under the National Environmental Policy Act to prepare an environmental impact statement in connection with its grant of a new 40-year hydropower license for an existing dam, where it is undisputed that the dam causes significant environmental harms and where the relicensing provisions of the Federal Power Act require a de novo evaluation of the project's harms and benefits.

2. Whether the court of appeals' decision in this case bars the use of "reopener clauses" that permit the Commission to require post-licensing modifications in a dam's operations.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 16

TABLE OF AUTHORITIES

Cases:

Black v. *Cutter Laboratories*, 351 U.S. 292 13

California v. *FPC*, 345 F.2d 917, cert. denied, 382 U.S. 941 13

Escondido Mutual Water Co. v. *La Jolla Band of Mission Indians*, No. 82-2056 (May 15, 1984) 9, 10

Friends of the River v. *FERC*, 720 F.2d 93 14

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. *FPC*, 510 F.2d 198 ..... 8, 10

Pacific Gas & Electric Co. v. *FERC*, 720 F.2d 78 13

Scenic Hudson Preservation Conference v. *FPC*, 354 F.2d 608, cert. denied, 384 U.S. 941 14

Swinomish Tribal Community v. *FERC*, 627 F.2d 499 14

Page

Cases—Continued:

Udall v. *FPC*, 387 U.S. 428 ..... 9, 14

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 11

Statutes, regulations and rule:

Federal Power Act, 16 U.S.C. 791a *et seq.* 5

§ 4(e), 16 U.S.C. 797(e) 9
§ 6, 16 U.S.C. 799 13
§ 10(a), 16 U.S.C. 803(a) 8, 9
§ 15, 16 U.S.C. 808 8
§ 15(a), 16 U.S.C. 808(a) 8, 9, 11

Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.* 5

National Environmental Policy Act § 102(2)(C), 42 U.S.C. 4332(2)(C) 7, 10

Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 837 *et seq.* 5

42 U.S.C. 7172 2

18 C.F.R. 4.41 (1976) 5

40 C.F.R. :

Section 1502.14(d) 10
Section 1502.14(f) 10

Sup. Ct. R. 21.1(a) 14

Miscellaneous:

H.R. Rep. 1643, 90th Cong., 2d Sess. (1968) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a, 74a-75a) is reported at 746 F.2d 466. The orders of the Federal Energy Regulatory Commission (Pet. App. 23a-57a, 58a-67a, 68a-73a) are reported at 15 F.E.R.C. ¶ 62,187, 19 F.E.R.C. ¶ 61,223, and 21 F.E.R.C. ¶ 61,264, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1984. Petitions for rehearing were denied on October 30, 1984 (Pet. App. 74a-75a). On January 23, 1985, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to February 27, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of the relicensing of the Rock Island Dam hydropower installation by the Federal Energy Regulatory Commission.[1] Rock Island Dam is located on the upper Columbia River. Major tributaries above the dam are used by anadromous fish, such as chinook, coho and sockeye salmon and steelhead trout, for spawning and rearing. These fish populations have historically supported commercial, recreational, and tribal fisheries in several states and off the coast of Canada. Because Rock Island lacks facilities to allow for the passage of juvenile fish migrating downstream, the fish suffer significant mortalities when they pass through the dam's power turbines.

Rock Island was originally licensed for a 50-year term in 1930. Petitioner, the licensee of the project, applied for a new license in 1977. After granting two annual licenses, the Commission issued a new 40-year license to petitioner in 1981. The Secretary of Commerce (representing the National Marine Fisheries Service (NMFS)) and the Yakima Indian Nation sought review of the Commission's order. Petitioner intervened in support of the order, and the National Wildlife Federation and the Washington State Departments of Fisheries and Game (Washington) intervened in opposition to it. The court of appeals set aside the license on the grounds that the Commission had failed to give adequate pre-licensing consideration to fish-protection issues and had failed to prepare an environmental impact statement (EIS).

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[1]The Federal Energy Regulatory Commission succeeded to the functions of the Federal Power Commission effective October 1, 1978 (see 42 U.S.C. 7172). The term "Commission" will be used interchangeably to refer to both agencies.

1. a. The Commission distributed petitioner's 1977 license application to NMFS for comments, stating that petitioner's "Exhibit S" — its report on fish and wildlife impacts — had not yet been filed but that it would "also be distributed, after it is submitted and found to be acceptable" (C.A. App. 3). NMFS and Washington intervened in the licensing proceeding in 1978 and requested that any new license require protection for migrating fish based on the best available technology (*id.* at 29). NMFS also stated that the Commission must consider "the beneficial impact of returning the river to a free-flowing condition with unrestricted fish passage and restoration of spawning and rearing areas for anadromous fish" (*id.* at 34).

In 1981, the Commission's Director of Electric Power Regulation issued a new 40-year license to petitioner (Pet. App. 23a-57a). During the more than two years following NMFS's intervention, the Commission had failed to advert to fish-protection issues, to hold any hearings, or to prepare an EIS; nor had it required petitioner to submit an Exhibit S. The new license included a standard "reopener" clause (Article 15) allowing the Commission to require "reasonable modifications of the project structures and operation" for the purpose of "conservation and development of fish and wildlife resources" (*id.* at 50a). The only project-specific fish and wildlife condition included in the new license was Article 38, which further extended the date for submission of the missing Exhibit S to May 1984 (C.A. App. 118).

b. NMFS, joined by several interested private and governmental organizations, appealed to the Commission. They maintained that the Director's order did not satisfy the Commission's legal obligation to give full consideration to fish impacts prior to licensing and suggested submitting the matter to an administrative law judge for proceedings to develop specific license conditions, including installation of turbine bypass systems (C.A. App. 148-150).

Acting without a hearing, the Commission affirmed issuance of the license to petitioner (Pet. App. 58a-67a). The Commission recognized the "continuing impact of the project on the fisheries resource" (*id.* at 63a) and the "unknown[]" (*id.* at 65a) extent of that impact. Nonetheless, the Commission concluded that it was not required to address fish impacts or fish-protection measures in the licensing proceeding because they were being considered in the "Mid-Columbia proceeding" (*id.* at 61a). In the Mid-Columbia proceeding, which is a consolidation of license modification petitions filed in 1976 and 1978, the Commission is considering various fish-protection proposals with respect to five dams, including Rock Island (*id.* at 109a-120a). The purpose of the proceeding, as stated by the Commission, is to determine whether "reasonable modifications" (*id.* at 111a) of the licenses "should be required for the remainder of the license terms" (*id.* at 119a).[2] The Commission concluded that it was not required to prepare an EIS in connection with its relicensing of Rock Island because fish impacts were being considered in the Mid-Columbia proceeding and no new adverse environmental effects would be caused by relicensing (*id.* at 62a-63a). On rehearing, the Commission adhered to its earlier decision essentially for the same reasons (*id.* at 68a-73a).

2. a. The court of appeals set aside the licensing order (Pet. App. 1a-22a, 74a-75a). The court reasoned that the law is "well defined" — "[*p*]*rior* to issuance of a new license, FERC must study the effect of a project on the fishery resource and consider possible mitigative measures" (*id.* at 10a (emphasis added)). Because it was "undisputed that in

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[2]The dams' licensees, including petitioner, have argued in the Mid-Columbia proceeding that, notwithstanding the reopener clauses in their licenses, "the Commission lacks the authority to require modifications in the current minimum flows * * * without their consent" (Pet. App. 111a).

this proceeding the FERC did not undertake this obligation prior to issuing the license" (*ibid.*), its order could not stand. The court concluded (*id.* at 14a-18a) that the Commission's failure to consider fish-protection issues prior to licensing violated the Federal Power Act (16 U.S.C. 791a *et seq.*), the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 837 *et seq.*), and the Commission's own regulations (18 C.F.R. 4.41 (1976)).

The court rejected the argument that deferral of fish-protection issues pending completion of the ongoing Mid-Columbia proceeding was sufficient to satisfy the Commission's duty to address these issues prior to granting a license (Pet. App. 12a-14a). Although it recognized the importance of addressing these issues "with a view to the total system" of dams (*id.* at 12a), the court concluded for a number of reasons that the Commission's complete failure to consider these questions in the Rock Island licensing proceeding was unlawful. First, the Federal Power Act itself requires prelicensing consideration of fish-protection issues (*ibid.*). Second, the Commission could have continued issuing annual licenses to petitioner to preserve the status quo while the Mid-Columbia proceeding continued (*ibid.*). Third, the Commission's discretion to impose reasonable modifications pursuant to reopener clauses in the Mid-Columbia proceeding was more circumscribed than its discretion to impose operating conditions in the licensing proceeding itself (*id.* at 13a-14a). Finally, deferral of fish issues reduced incentives to address the questions in a timely fashion, as the licensee, once it has obtained a license, "may very well attempt to forestall the imposition of protection measures" because of their adverse impact on power production (*id.* at 14a).

b. The court of appeals also ruled that the Commission must prepare an EIS prior to relicensing the Rock Island project (Pet. App. 18a-22a). The court reasoned (*id.* at 21a)

that the Federal Power Act contemplates "much more than a mere continuation of the status quo when the decision is made to relicense" — "[r]elicensing * * * is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo." Post-licensing consideration of these issues in the Mid-Columbia proceeding could not, in the court's view, satisfy the Commission's obligation to prepare an EIS prior to licensing Rock Island (*id.* at 21a-22a).

c. In denying rehearing (Pet. App. 74a-75a), the court clarified that federal takeover of the project is not an option in this case because the licensee is a municipality.

3. The Mid-Columbia modification proceeding has continued, but with little progress toward ultimate resolution of the fishery issues. An interim settlement providing for a five-year study program and other measures was approved by the Commission in 1980 (Pet. App. 121a-126a). In 1981, the fishery agencies moved to set aside the agreement, citing the lack of progress toward fish protection (C.A. App. 192-232). The parties have since proceeded on the basis of annual stipulations regarding studies and dam operations. These effectively superseded the interim settlement agreement which, in any event, expired by its own terms in 1984. There is currently no schedule for long-term resolution of fishery issues at the mid-Columbia dams. No evidentiary hearings have been held during the six years of the proceeding, though a limited hearing is scheduled for June 1985 to consider petitioner's opposition to further annual stipulations with respect to Rock Island.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner argues (Pet. 12-15) that no environmental impact statement is required because relicensing of Rock Island represents only a continuation of the status quo. This view fails to take account of the obligation imposed on the Commission by the Federal Power Act to conduct a de novo assessment of the harms and benefits of a project and of its operating conditions in deciding whether to issue a new license, just as it must conduct such an assessment when deciding whether to issue the initial license for a project. The relicensing decision is therefore much more than merely a continuation of the status quo. It represents a break with the past and a fresh look at whether and under what conditions a hydropower installation should operate. Where, as here, the installation significantly affects the environment, the National Environmental Policy Act (NEPA) requires that the Commission prepare an EIS before issuing a new license.

a. Under Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)), federal agencies must prepare environmental impact statements with respect to all "major Federal actions significantly affecting the quality of the human environment." It is undisputed, and the court of appeals found (Pet. App. 3a), that Rock Island does have "a significant impact on the environment, especially anadromous fish runs," because of the "significant number of juvenile salmon and steelhead" that die in the course of attempting to pass through the installation's turbines. Evidence in the administrative record (C.A. App. 269-270) shows that the mortality rate for juvenile fish passing the dam is likely to be between 10 and 30 percent.

b. Given this significant adverse impact on the environment, the only question is whether relicensing of Rock Island is a "major Federal action" within the meaning of Section 102(2)(C). The court below, as it noted (Pet. App. 18a), is the first court to have addressed the applicability of

the EIS requirement to relicensing of hydroelectric power installations; accordingly, there is no conflict requiring resolution by this Court.[3] In any event, the court of appeals' factbound decision is correct.

Section 15(a) of the Federal Power Act (16 U.S.C. 808(a)) authorizes the Commission "to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee." Congress did not contemplate the automatic reissuance of a new license containing the same conditions as the old one to the old licensee. See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *FPC*, 510 F.2d 198 (D.C. Cir. 1975). Rather, the Commission must impose in the new license whatever conditions are currently necessary to meet the public interest standard set forth in Section 10(a) of the Act (16 U.S.C. 803(a)).[4]

When it amended Section 15 of the Act in 1968, Congress made it clear that the Commission's inquiry on relicensing must represent a de novo balancing of all relevant harms and benefits, analogous in this respect to the original licensing decision itself:

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[3]Petitioner (Pet. 12-13) and the Commission (FERC Br. 10-12) rely on cases holding that mere continuation of the status quo does not trigger the obligation to prepare an EIS under NEPA. These cases are inapposite because of the special requirements of the Federal Power Act, which mandate complete reconsideration of a hydroelectric project on relicensing. None of the cases relied on by petitioner and the Commission involve situations where a federal agency was required by Congress (wholly apart from NEPA) to undertake a fresh evaluation of the project in question.

[4]Section 10(a) provides that any approved project must "be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes."

> *Just as in the case of original licensing* the controlling criteria would be the comprehensive development standard of section 10(a) of the Federal Power Act. In view of this fact the relicensing proceeding would be deemed to involve "initial licensing" within the context of the Administrative Procedure Act rather than "license renewal."

H.R. Rep. 1643, 90th Cong., 2d Sess. 5 (1968) (emphasis added). The standard mandated by Section 10(a) (see note 4, *supra*) requires the Commission to consider all beneficial public uses of the waterway, including fishery uses. See *Udall* v. *FPC*, 387 U.S. 428, 440 (1967).[5] The Commission itself, which proposed the 1968 amendments, understood at that time that a full reevaluation must be made at the time of relicensing.[6] As the Chairman of the Commission stated (H.R. Rep. 1643, *supra*, at 6 (emphasis added)):

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[5]The Court stated in *Udall* (387 U.S. at 450):

> The test [under Section 10(a)] is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the "public interest," including * * * the preservation of anadromous fish for commercial and recreational purposes * * *.

[6]Though it did not urge the point in its brief below, the Commission now contends (FERC Br. 15 n.8) that "the inquiry on relicensing is more limited than at the time of issuance of the original license." The legislative history cited by the Commission does not even advert to the issue, let alone support the Commission's argument. *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, No. 82-2056 (May 15, 1984), slip op. 13-14 n.23, cited by the Commission (FERC Br. 15 n.8), is not relevant to the scope of the Commission's inquiry on relicensing under Sections 10(a) and 15(a) of the Act. The Court there raised only the question whether Section 4(e) of the Act, relating to the imposition of initial license conditions by the Secretary of the Interior for projects on Indian reservations, is applicable on relicensing.

> The Congress limited the maximum term of any license issued by the Federal Power Commission to 50 years and thereby preserved for the Nation, acting through subsequent Congresses, *a full opportunity to reevaluate the best use of each project upon expiration of the license*. We now recommend that Congress fix appropriate procedures for the reevaluation of each project in light of contemporary and prospective public needs.

c. Under the Federal Power Act, then, the Commission must start from a clean slate in deciding whether to relicense a particular project. The choice of licensee, the operating conditions to be imposed on the project, and indeed whether the dam should be permitted to generate power at all,[7] must all be fully reevaluated in light of the current and future public interest. This is no mere continuation of the status quo — it represents a new commitment of a public water resource. Nor may the Commission adopt the prior licensee's application on a pro forma basis. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 510 F.2d at 204 n.21. The legislative history of NEPA cited by the Commission (FERC Br. 10 (emphasis omitted)) in fact supports the court of appeals' decision: " 'project proposals * * * or expansion or revision of ongoing programs' " are within Section 102(2)(C). Relicensing pursuant to the de

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[7]The Commission's argument (FERC Br. 13) that nonpower licenses are of purely historical interest is erroneous. Only last Term, the Court considered a case where some of the respondents had sought such a license. *Escondido Mutual Water Co.*, slip op. 3 & n.5. Indeed, whether to issue a nonpower license seems to be precisely the sort of issue that should be explored in an EIS. See, *e.g.*, Council on Environmental Quality, Regulations for Implementing the Procedural Provisions of NEPA, 40 C.F.R. 1502.14(d) and (f) (EIS must include analysis of "the alternative of no action" as well as "mitigation measures not already included in the proposed action or alternatives"). In any event, the court of appeals' reference to nonpower licenses is purely dicta in view of the other factors that must be considered on relicensing.

novo review requirement of Section 15(a) of the Federal Power Act plainly constitutes either a proposal itself or the revision of an ongoing program for purposes of NEPA.

Curiously, the Commission recognizes (FERC Br. 15) that "there may be instances where an EIS is a necessary prerequisite before issuing a new license." Apparently the Commission would apply this requirement only to new construction. What the Commission fails to recognize, however, is that conditions of operation may be a much more important factor affecting the viability of fish resources than new construction. At Rock Island, for example, requiring petitioner to take measures to assist juvenile fish in avoiding the turbines during their migration would lead to greatly reduced mortality rates over the 40-year life of the license. An EIS focusing on ways to reduce fish mortalities, long sought by NMFS, Washington and others, would not trivialize NEPA but rather would assist the Commission in making the required determination of whether to impose new license terms and conditions.[8]

d. Petitioner's (Pet. 10-11) and the Commission's (FERC Br. 9) complaints regarding the administrative burden imposed by the court of appeals' decision are speculative and unconvincing. The petition does not seek review of the court of appeals' holding that the statutory and regulatory

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[8]Petitioner's (Pet. 14) and the Commission's (FERC Br. 15-16) reliance on *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is misplaced. There, the question was whether an EIS should have included consideration of alternative sources of energy; here, the question is whether an EIS is required at all. The court of appeals held only that the Commission must prepare an EIS. Any consideration of the alternatives that must be analyzed under it is premature. In any event, operational modifications to the project for the purpose of protecting anadromous fish — which would of course be considered in the EIS — are undoubtedly within the realm of the feasible.

framework governing relicensing requires prelicensing consideration of fish-protection issues (see pages 12-14, *infra*); the incremental burden of preparing an EIS as well should not be significant. In addition, an EIS will be required only where a particular dam's operations significantly affect the environment; the court did not hold that an EIS is required for every relicensing. Relicensing proceedings, moreover, are time-consuming even where an EIS is not prepared. In this very case, four years passed between petitioner's application and the Commission's issuance of its initial decision even though there was no competing applicant. It should not prove difficult to complete the EIS within the existing time period already required for relicensing. Finally, even if EIS preparation is burdensome for the agency, Congress has made the judgment in NEPA that an EIS is required. This judgment cannot be overridden merely for the sake of administrative convenience.

2. a. The second question presented by petitioner (Pet. i) is whether the Commission may issue a license containing a reopener clause allowing the Commission to add conditions to the license at a later date. The question is a peculiar one, as the court below did not bar the use of reopener clauses, nor did any of the parties urge such a result. The court's holding (Pet. App. 10a) is that "[p]rior to issuance of a new license, FERC must study the effect of a project on the fishery resource and consider possible mitigative measures." The primary reason given for this holding was that it is required by the Federal Power Act and other applicable statutes; this requirement alone would be sufficient to uphold the court of appeals' decision. As one of several supporting reasons, the court pointed to the Commission's more narrow authority in the Mid-Columbia proceeding as compared to the relicensing proceeding (see page 5, *supra*). Petitioner apparently takes issue only with the court of appeals' dicta concerning the Commission's discretion in

the Mid-Columbia proceeding, without attacking the judgment. There is no basis for the Court's review in such circumstances. *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statements in opinions.").

In any event, the court did not, by way of dictum or otherwise, bar the use of reopener clauses.[9] Rather, the court determined that reopener clauses alone cannot substitute for prelicensing consideration of fishery issues (Pet. App. 12a-14a). The court's reasoning was merely that the Commission's authority to impose fish-protection measures pursuant to reopener clauses, as in the Mid-Columbia proceeding, is more narrow than its authority in a relicensing proceeding. This is undoubtedly correct, for only "reasonable modifications" may be imposed pursuant to reopener clauses; more substantial changes may constitute "amendments" to the license, which are prohibited absent the licensee's consent (Section 6 of the Act, 16 U.S.C. 799).[10] In a relicensing proceeding, by contrast, the Commission is

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[9]The Commission finds (FERC Br. 16) that it is "difficult to gauge the full scope of the court's ruling." The Commission's difficulty appears to arise because of its misreading of the court's opinion. It is difficult to imagine how, in the posture of this case, the court could have barred the use of reopener clauses, for no new condition has been imposed here pursuant to such a clause. Because the court did not forbid the use of reopener clauses, its decision does not conflict with the earlier decision of the same court of appeals in *California* v. *FPC*, 345 F.2d 917 (9th Cir.), cert. denied, 382 U.S. 941 (1965), or with the decision in *Pacific Gas & Electric Co.* v. *FERC*, 720 F.2d 78 (D.C. Cir. 1983), both of which merely upheld the Commission's authority to impose reopener clauses.

[10]Petitioner itself has argued in the Mid-Columbia proceeding that the modifications sought by NMFS would constitute prohibited amendments to its license (C.A. App. 54-55, 75-76; see also note 2, *supra*).

free to impose over the licensee's objection whatever conditions are in the public interest, no matter how substantial the changes (see pages 8-11, *supra*).

b. Although the petition does not present the question, the Commission appears to take issue (FERC Br. 18-19) with the court of appeals' ruling that it must address fish-protection issues prior to granting a license. Because the question is not presented by petitioner, it is not before the Court (Sup. Ct. R. 21.1(a)). But even if the petition is interpreted to raise this issue,[11] review is unwarranted, for the decision is correct and there is no conflict.

The Commission has pointed to no authority supporting its position that it may completely defer consideration of fishery issues until after it has granted a license. This Court and the courts of appeals have consistently concluded otherwise. See *Udall* v. *FPC*, 387 U.S. at 440; *Friends of the River* v. *FERC*, 720 F.2d 93, 98 (D.C. Cir. 1983); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 624 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).[12] The

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[11]Petitioner argues (Pet. 15) that the court's statement concerning the Commission's discretion to impose new conditions pursuant to re-opener clauses is "the linchpin" of its holding that the Commission must give pre-licensing consideration to fishery issues. A straightforward reading of the court's opinion (Pet. App. 8a-15a) demonstrates that this is simply not true. The court relied first and foremost on the provisions of the Federal Power Act itself and then on a number of other reasons, including the Commission's ability to preserve the status quo pending the mid-Columbia proceeding by issuing annual licenses and the reduced incentives for addressing fishery issues once petitioner has its long-term license in hand.

[12]*Swinomish Tribal Community* v. *FERC*, 627 F.2d 499 (D.C. Cir. 1980), is inapposite. There, the court permitted the Commission to defer consideration of minimum flows where the issue had not been timely raised, the Commission had already given extensive consideration to environmental issues and had prepared an EIS, and the issue could be resolved in an upcoming relicensing proceeding (such as the one at issue here) rather than through an amendment to the license, which was at

court of appeals' decision does not interfere with the Commission's discretion to structure its own proceedings within statutory limits; nor does it prevent the Commission from engaging in a systematic study of fish-protection issues at all of the Mid-Columbia dams (if the Commission does in fact undertake such a study). All that the court requires is that inquiry into these issues as they relate to Rock Island be made before relicensing that project. The Commission may grant annual licenses to preserve the status quo pending such a proceeding, or it may develop a record on Rock Island alone and rely on the reopener clause to make modifications in light of conclusions made when, if ever, the Mid-Columbia proceeding is completed. The one tack that the Commission may not take is the one that it adopted here — relicensing the project for a substantial period of time without prior exploration of all issues relating to the public interest, including preservation of anadromous fish.[13]

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issue there. Here, by contrast, the questions have been raised in a timely fashion and the Commission has given no consideration to fish-protection issues in the licensing proceeding itself.

[13]The Commission's suggestion (FERC Br. 18-19) that it issued the new license to petitioner on the basis of the "best information then available" lacks foundation in the record. The interim mid-Columbia settlement (see page 6, *supra*) did not provide information on fishery issues; it simply established a study program to obtain such data. Nothing in the record of the Rock Island relicensing proceeding, which is wholly separate from the Mid-Columbia proceeding, indicates any consideration of fish-protection issues. The Commission nowhere addressed the fish-protection questions raised by the fishery agencies, nor did the Commission ever require petitioner to submit its Exhibit S on fish and wildlife impacts. Little wonder then that the court of appeals concluded (Pet. App. 10a) that "[i]t is undisputed that in this proceeding the FERC did not undertake [its obligation to consider fish impacts and mitigative measures] prior to issuing the license."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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